

for The Defense

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Collateral Consequences of Convictions

The Unseen Impact on Clients, Families and Barriers to Community Reentry

By Christopher Johns, Training Director

"And the Lord put a mark on Cain, so that no one who came upon him would kill him."

—Genesis 4:15

In his 1966 song, "Rainy Day Women #12 & 35," Bob Dylan notes that "they'll stone you and say it's the end. Then they'll stone you and then they'll come back again." The stones could just as well be a metaphor for the direct and collateral consequences of a conviction.

Direct consequences are those that have a definite, immediate and largely automatic effect upon the defendant's punishment. Collateral consequences, on the other hand, tend to be contingent upon action taken by an individual or individuals other than the sentencing court—such as another governmental agency or the defendant herself.

Always a Con

For many of our clients, their prison sentence is just the first stone in a slew of collateral consequences resulting from a felony conviction.

Some collateral consequences, for example, prevent our clients from receiving everything from government and commercial loans to housing.

The criminal justice system continues to inflict harm by tossing stones at a convicted felon long after he or she has left prison. And, for the client's family, the collateral consequences of a felony conviction are tantamount to a slow civil death sentence. One way or the other, it affects their entire lives.

Every Felony Conviction is a Life Sentence

It is so obvious that we often seem to forget that punishment is the legalized infliction of harm on our clients. And, for at least the last thirty years, the harm, the stoning, if you will, has generated numerous collateral consequences far beyond denial of the right to vote, or even the serious immigration consequences for clients who have come here legally or illegally.

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P D

*Delivering
America's Promise
of Justice for All*

for The Defense

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In the recently published book, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, edited by Marc Mauer and Meda Chesney-Lind, the editors note that social scientists have long recognized that all social policies have what might be termed intended and unintended, or collateral, consequences.

Even for the seasoned criminal defense lawyer, some of the invisible punishments that result from convictions may be obscure. The problem, of course, is that with government resources for indigent defense nearly always at minimal levels of funding, even in the best of economic times, public defenders, the justice system, and, most importantly, the public, have not focused on the vicious cycle of poverty, mental illness, inadequate housing, poor health care, and lack of educational opportunities that often fuel crime rates.

The Increasing Denial of Social Services

For example, how often does the system discuss the staggering number of parents who now have a permanent criminal record? In almost all circumstances, even a class 6 designated felony conviction will follow our clients for the remainder of their lives. It is a permanent record that may thwart ex-offenders—former clients—from obtaining or holding a job. Likewise, a criminal record may preclude an offender or his family from obtaining subsidized housing, or student

loans, and may cause the termination of parental rights.

The numbers are staggering. An estimated 66 percent of adult women in state prisons have minor children. Nearly one-quarter of those have had a baby within 12 months or will deliver during incarceration. Over 70 percent of women in local jails have young children, and nearly 72 percent of those on probation have children as well.

In 2000, nearly 6.5 million adults were under the supervision of either a state or federal correctional system. Finding how many people have a criminal record is impossible even with a “Google” search, but one estimate is that a sobering 59 *million* individuals have criminal history files either in state or federal systems. Some of these individuals may, in all likelihood, have records in multiple states. Still, there is not much doubt that millions of Americans have been processed through the criminal justice system.

How does the ex-offender, especially one who is a parent, re-enter the community? It is a difficult task.

The analogy that comes to mind to some in the criminal justice system is people with Hansen’s disease, or what sometimes is referred to as leprosy. Leprosy is a dreaded disease. It has been feared since antiquity. So-called lepers were forced to wear a “leper’s bell” so that people knew they were coming. Cities sometimes had a large bell that was beaten when lepers were spotted in the street. Lepers were required to keep themselves “ten cubits and a span” from others. The get-tough 80’s and 90’s have done for the ex-offender what antiquity’s legacy did for Hansen’s disease.

Temporary Assistance for Needy Families & Foods Stamps Are Denied

For example, federal law now requires a *lifetime* ban on Temporary Assistance for Needy Families (TANF) and food stamps for people

Contents

| | |
|--|----|
| Collateral Consequences of Convictions | 1 |
| Collateral Consequences Chart | 7 |
| New Generation of Justice Hits ASU | 11 |
| Law of the Land, Good Ideas Gone Bad | 12 |
| Practice Pointer | 16 |
| Jury and Bench Trial Results | 18 |
| Arizona Advance Reports | 20 |

with felony drug convictions after August 22, 1996—no matter how the individual may have rehabilitated herself.¹ A state may “opt out” of the ban, and a majority of states have.

Arizona, however, has not opted out.² A bill modifying the ban has been introduced during this legislative session.

Housing

Similarly, recent amendments to the U.S. Housing Act have created substantial barriers to our clients receiving subsidized housing benefits.³ Most of us as practitioners know that our clients often have substantial housing needs—some are just plain homeless. The Housing Opportunity Program Extension Act of 1996, allows public housing agencies the authority to (42 USCA sec. 1437):

* Access criminal records of the applicant or current tenant

* Access records from drug treatment facilities where that information is *solely related to whether the applicant is currently engaging in the illegal use of a controlled substance.*

Consequently, public housing authorities, for example, Section 8 Tenant Based Housing Assistance Programs, may deny an applicant's admission to the housing project based on past drug use or a conviction.

Drug Convictions Prevent Clients from Receiving Student Aid

For most of us, education has been the key to reaching our dreams. Getting an education is part of the American Dream. Low-income families especially need education to improve the opportunities to support their families.

Unfortunately, as part of its 1998 reauthorization of Title V of the Higher

Education Act of 1965, Congress barred people who have convictions for possession or sale of controlled substances from obtaining Pell grants or student loans for varying periods

of time, depending upon the number of offenses. A third offense constitutes an indefinite bar. Prisoners lost their eligibility for financial aid in the 1992 reauthorization.⁵

Go to Prison, Lose Your Child

A parent who goes to prison may have her parental rights severed. For example, a parent convicted of a felony which shows unfitness for future custody or who receives a sentence of sufficient length to deprive a child of a home for a number of years, provides a statutory ground for termination. See A.R.S. § 8-553(b).

The Adoption and Safe Families Act of 1997 accelerates parental rights termination and may prevent clients from ever becoming foster or adoptive parents.

Voting

The overwhelming majority of states impose restrictions on a felon's right to vote. Arizona's present statutory scheme for general disabilities and occupational disabilities is less punitive than in some states. A.R.S. § 13-904.

For example, in Arizona, a first-time offender's right to vote, hold a public office of trust, and serve as a juror is only temporarily suspended. Final completion of the client's sentence restores the above rights. Clients are not rendered incompetent as witnesses by reason of a prison sentence, or prevented from conveying property. Nor is a person

In almost all circumstances, even a class 6 designated felony conviction will follow our clients for the remainder of their lives. It is a permanent record that may thwart ex-offenders—former clients—from obtaining or holding a job.

disqualified, as general matter, from employment—although proving that discrimination was based on a person's conviction may be another matter.

Firearms

In addition to the above, a client also forfeits the right to possess a gun or firearm. Under federal law, it is unlawful for any person who is under indictment for, or has been convicted in *any* court of, a crime punishable by imprisonment for a term exceeding one year, to sell or otherwise dispose of a firearm or ammunition. 18 U.S.C. § 922. Federal law also prohibits firearm possession by any person convicted of a felony or misdemeanor crime of domestic violence. 18 U.S.C. § 922 (g) (9). A person adjudicated delinquent under A.R.S. § 8-341 does *not* have the right to carry or possess a gun *or* firearm.

Unless an exception is made, federal law also prohibits an individual convicted of a felony to enlist in any branch of the armed forces. 10 U.S.C. § 504.

Important Collateral Consequences Under Arizona Law

The collateral consequences of a felony conviction for adults and a felony adjudication for juveniles are scattered throughout the Arizona Revised Statutes Annotated (A.R.S.). Most are found in Title 13 and 8.

A.R.S. § 13-904 provides that a felony conviction suspends the following civil rights:

- * To vote.
- * To hold public office.
- * To serve as a juror.
- * To possess a gun or firearm.

Further, if a client is imprisoned, other “civil rights” may be suspended which are “reasonably necessary” for the security of the

corrections institution where the person is imprisoned.

Restitution is, of course, mandatory. Moreover, A.R.S. § 13-807 precludes a defendant convicted of a crime from denying in any civil action the essential allegations of the criminal offense. Nor does a restitution order preclude a victim from bringing a civil action and proving damages in excess of court ordered restitution. *See* A.R.S. § 13-807.

HIV Testing

Other collateral consequences often flow from a particular crime of which the client is *charged* or convicted. An assault on a law enforcement officer involving biting, scratching, spitting, or transferring of bodily fluids, as well as in other situations, entitles the officer to obtain an order authorizing HIV testing of the person charged if there is probable cause to believe that the client committed the offense. Hence, a conviction is not required to trigger the seizure of the client's blood for testing. *See* A.R.S. § 13-1210(B).

Likewise an accused, including a minor, may be tested for HIV under A.R.S. § 13-1415, based upon the alleged commission of a sexual offense. A hearing is required in which the prosecutor must show “significant exposure.” A.R.S. § 13-1415(B).

DNA Testing

Within 30 days of being convicted, whether the client is an adult or juvenile, the state may take a sufficient sample of blood for DNA testing as the result of the commission of *any* felony offense. A.R.S. § 13-610 (N) (5).

Duties to Give Notice of Conviction

It is a class 5 felony for a person convicted of a dangerous crime against children not to

provide notice of her conviction to a business institution or organization that “sponsors any activity in which adults supervise children.” See A.R.S. § 13-3716.

Sex Offender Registration

Approximately sixteen offenses, from kidnapping of a child under eighteen years of age who is not your own, to sexual exploitation of a minor, require lifetime registration as a sex offender under A.R.S. § 13-3821. The statute applies to adults and juveniles—although the court retains discretion in the case of a juvenile. A.R.S. § 13-3821 (C). If, however, registration is imposed when the offender is a juvenile, the court may order termination of the term or it terminates automatically when the offender reaches twenty-five years of age. See A.R.S. § 13-3821(F), (G). Sex offender registration also imposes a duty to obtain annually an identification card or driver’s license with “proof of address.” Sex registration is for life unless it is for certain kidnapping offenses, in which case it terminates after ten years. See A.R.S. § 13-3821 (L).

Sex offenders are also subject to community notification laws provided in A.R.S. §§ 13-3825 and 3826. Community notification may include publication of the offender’s name on an Internet sex offender web site. See § 13-3837.

Teaching and Nursing

If a person is certified to teach in Arizona, any felony conviction must be reported to the certifying board by the clerk of the court. See A.R.S. § 13-3990. Pursuant to A.R.S. § 13-32-1646 (B), an applicant for nursing assistant certification (NAC) is not eligible for certification if the applicant has any felony

convictions and has not received an absolute discharge.

A.R.S. § 41-1758.03 delineates the offenses that preclude a person from obtaining a “class one fingerprint clearance card.” The offenses include, besides most sexual offenses, exploitation of minors and vulnerable adults, first-and second- degree murder, manslaughter, endangerment, assault, assault by vicious animal, and drive-by shooting. Conviction of most drug offenses also precludes obtaining a fingerprint clearance card. See A.R.S. § 41-1758.03 (C).⁸

Son of Sam

A contract by an accused for any form of media description of “a crime” is void unless it provides that monies received go to a commission. If the accused is convicted, the money goes to the crime victim if they timely apply to the commission. A.R.S. § 13-4201 (A) and (B).

Similarly, A.R.S. § 12-511 (A) (1) extends the statute of limitations for any civil action by a victim for one year “from the time the conviction becomes final.”⁹

Driving

License suspension for misdemeanor and felony DUI is well known to criminal practitioners. Less well known is that certain offenses committed by clients under age eighteen, including criminal damage-graffiti offenses, car theft, and drug offenses result in loss of a driver’s license. See A.R.S. § 28-3320. An extreme DUI or Aggravated DUI may result in a license suspension for three years. A.R.S. § 28-3320(A)(2); 28-1383(J)(1). Similarly, A.R.S. § 28-3320 lists all of the offenses for which a client in juvenile court may lose their driver’s license.

What Do We Need To Tell Our Clients?

There is no single appellate case that requires criminal defense lawyers to explain all of the collateral consequences of a plea agreement. Appellate courts have been extremely reluctant to impose a duty to warn clients of the collateral effects of guilty pleas. The fundamental issue is whether the client entered into an agreement after proper advice and with an understanding of the important consequences that pertain to the voluntariness of the plea.

That doesn't mean there is not a duty to reasonably inform the client under the Rules of Professional Conduct, or as good practice, of all the conceivable collateral consequences. Every case and client is different. What may be important to one may be less important to another.

The important practice issue is to be active and not passive. Practitioners should ask their clients what is important to them, and take the initiative to learn about the collateral consequences that frequently occur in their jurisdiction (for example, immigration consequences are a frequent consequence in our state).

The American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty, Third Edition (1999) says it this way:

Responsibilities of Defense Counsel—
Standard 14-3.2(f):

To the extent possible, defense counsel should determine and advise the [client], sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Likewise, the National Legal Aid and Defender Association notes in its *Performance Guidelines for Criminal Defense Representation* that “counsel should be fully aware of, and make

sure the client is fully aware of . . . [the] consequences of conviction such as deportation, and civil disabilities.” See Guideline 6.2 (Contents of the Negotiations). The *Performance Guideline* comments emphasize that “all foreseeable potential consequences of a conviction by plea should be discussed with the client.” *Id.*

Conclusion

Criminal defense attorneys have a duty to protect their clients' interests. Sometimes, a client may be more adversely affected by a criminal conviction's collateral consequences than by the obvious direct impact of incarceration or probation. To fulfill the duty to protect our clients' interests, the collateral consequences need to be identified, evaluated, explained, and, to the extent possible, avoided or mitigated. To assist counsel, the chart that follows outlines the most common collateral consequences.

Although our clients may successfully complete probation or do their time, a convicted felon pays a penalty long after he "pays his debt to society." It is time to re-examine many of the onerous, counterproductive sanctions of the 80's and 90's.



Collateral Consequences Chart

| | | |
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| <p>Employment</p> <p>Arizona Law A felony conviction may bar clients from obtaining, keeping, or renewing a license for those who work with vulnerable populations including children, older people and the mentally ill. License restrictions or other statutory provisions may preclude holding certain offices.</p> | <p>Commission of any felony or misdemeanor involving moral turpitude Acupuncturists §32-3951(A)(1) Athletic Trainers §32-4153(6) Chiropractors §32-924(B)(6) Court Reporters §32-4024(A)(5) Dentists §32-1263(2) Homeopathic Physicians §32-2933(3) §32-2934 Medical Doctors §32-1451 §32-1401(25)(d) Naturopathic Physicians §32-1551 §32-1501(22)(c) Nurses §32-1663 §32-1601(14)(b) Occupational Therapists §32-3401(9)(m) §32-3442 Optometrists §32-1743(1) Osteopathic Physicians §32-1854(2) §32-1855 Physical Therapists §32-2044(7) Physician Assistants §32-2501(18)(u) §32-2551 Podiatrists §32-854.01(10) Psychologists §32-2061(A)(13)(l) Veterinarians §32-2232(10) §32-2233(A)(1)</p> <p>Conviction of any felony involving moral turpitude Appraiser §32-3631(A)(4)</p> <p>Conviction of any crime involving moral turpitude Radiological Technologists §32-2821</p> <p>Conviction of a felony Behavioral Health Professionals §32-3251(9)(a) §32-3281 Collections Agent §32-1053(A)(4) Contractors §32-1154(A)(8) Pest Control §32-2321(B)(9) Pharmacists §32-1927(A)(2) Private Investigators §32-202457(A)(7) Private Post Secondary Education §32-3051(2) Respiratory Therapists §32-3552(A)(3)</p> | <p>Other Home Inspectors: §32-122.02(A)(7) requires an applicant for certification to have "an absolute discharge from sentence at least five years before the application if the person has been convicted of one or more felonies."</p> <p>Remediation specialists, Temporary certification (§32-131(A)(2)) and Permanent certification (§32-131(E)) both preclude applicants with a felony conviction of fraud, misrepresentation or theft by false pretenses or violation of securities laws within past 7 years.</p> <p>Cosmetologists: §32-572(A)(2) states that conviction of any crime is grounds for suspension, refusal to issue or renew license or as disciplinary action.</p> <p>Accountants: §32-741(A) provides that conviction of any felony [if civil rights have not been restored] or of any crime that has a reasonable relationship to the practice of accounting (including accounting or tax violations, dishonesty, fraud, misrepresentation, embezzlement, theft, forgery, perjury or breach of fiduciary duty)[regardless of whether civil rights have been restored].</p> <p>Funeral Directors/Embalmers: §32-1366(A)(1) and §32-1301(54)(a)-(b) states that committing a class 1 or 2 felony committing a felony or misdemeanor if the crime has a reasonable relationship to funeral directing or embalming, precludes this employment.</p> <p>Real estate: §32-2124(M) precludes obtaining a license if have a felony conviction and currently incarcerated, under community supervision, under supervision of parole or community supervision officer, or on probation. §32-2153(B)(2) precludes obtaining a license if have a conviction of a felony, or of any crime of forgery, theft, extortion, conspiracy to defraud, a crime of moral turpitude or any other like offense.</p> <p>Security guards: §32-2612 bars employment in this area if charged with or convicted of any felony (unless civil rights have been restored); conviction of any crime involving fraud, physical violence, illegal sexual conduct or the illegal use or possession of a deadly weapon; conviction of any crime (involving any section of title 13, chapter 34 or 34.1) or theft if in last 5 years; cannot be on probation, parole or community supervision for any crime or have any outstanding arrest warrants; §32-2636 committing an act of misconduct involving a weapon pursuant to §13-3102.</p> <p>Radiological technologists: §32-2821 precludes employment if convicted of a crime of moral turpitude (unless civil rights have been restored).</p> |
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Collateral Consequences Chart

| | Federal Law | Arizona Law |
|-----------------------------------|---|---|
| Employment (continued) | <p>Numerous limitations and prohibitions, including:</p> <p>Employment involving public trust and fraud. 7 USC § 85</p> <p>Drugs offenses preclude defense work, 10 USC § 2408(a) and Food and Drug Occupations, 21 CFR 1309.72</p> <p>Federal jobs in agencies like:</p> <p>IRS, FBI, Secret Service, U.S. Marshals, Customs, DEA, Transportation, Federal Enforcement Officers.</p> <p>Sentencing guidelines may impose additional occupational restrictions.</p> <p>Federal statutes provide that certain convictions may result in loss or ineligibility for a federal license (import, locomotive engineer, pilot, flight instructor).</p> | See Information on Previous Page |
| Firearms | <p>The Bureau of Alcohol, Tobacco and Firearms (ATF) was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives and transferred to the Department of Justice under the Homeland Security Act.</p> <p>It is unlawful for any person under indictment or who has been convicted in any court of a crime punishable for a term of more than one year to sell or otherwise dispose of any firearm or ammunition. 18 USC § 922</p> <p>Federal law also prohibits firearm possession by persons convicted in any court of a misdemeanor crime of domestic violence.” 18 U.S.C. § 922 (g)(9)</p> | <p>A person convicted within or outside Arizona of any felony may not possess a deadly weapon (pistol, rifle or shotgun) if their right to possess a firearm has not been restored by court. ARS § 13-3101(6) (b), § 13-3102 (A) (4). After absolute discharge, if not a dangerous felony, gun rights may be restored by filing a Motion to Own or Possess Firearm. Notice is provided to state and federal prosecutors. A person convicted of a serious offense may not apply to carry a gun for ten years. ARS § 13-905(C).</p> |
| Immigration | <p>Immigrants may be deported when convicted of a crime defined as an “aggravated felony” 10 USC § 1101(a) (43). A person applying for lawful permanent residency status or citizenship may be placed in removal if the application or fingerprint check reveals a criminal history.</p> | <p>Federal Law Governs</p> <p>While not changing federal law, a petition to amend Rules 14.3 and 17.2, Ariz. R. Crim. P. is pending before the Arizona Supreme Court. If approved, it would require notice be given to defendants that a change of plea may affect immigration status or result in removal.</p> |
| Jury Service | <p>A person may not serve on a federal or petit jury if a charge is pending against or if the person has been convicted in a state or federal court of a crime punishable by imprisonment for more than one year and civil rights have not been restored. 28 USC § 1865(b) (5).</p> | <p>A felony conviction “suspends” the right to serve as juror. ARS § 13-904(A) (3). When a person completes all probation conditions, including fines and restitution, for a first or second felony conviction, or is absolutely discharged, rights to serve on a jury are automatically restored by the Clerk of the Court. A person convicted in U.S. District Court may apply to the Arizona Superior Court for restoration of state civil rights. ARS § 13-909.</p> |

Collateral Consequences Chart

| | Federal Law | Arizona Law |
|--------------------------|--|---|
| Federal Education | <p>A person convicted under Federal or state law for possession or sale of controlled substances is not eligible to receive any grant, loan or work assistance. 20 USC § 1091(r). In addition:</p> <p>For drug possession, 1st offense precludes for 1 year 2nd offense for 2 years 3rd offense indefinite</p> <p>For sale or trafficking, 1st offense precludes for 2 years Indefinitely for 2nd offense</p> | Federal Law Governs |
| Parental Rights | <p>State Law Governs</p> <p>Since 1978, the Indian Child Welfare Act provides special protection to Indian and the Indian tribes. If CPS removes a child, the child's parents and the tribe must receive additional protections.</p> | <p>Parental rights may be terminated on several grounds, considering the child's best interests including:</p> <ul style="list-style-type: none"> · Abandonment · Neglect and abuse · Chronic drug abuse · Parent convicted of a felony of nature which proves unfitness for future custody or such sentence length that child deprived of normal home for a period of years. See ARS § 8-553(B). |
| Public Office | <p>The U.S. Constitution does not specifically preclude felons from holding public office. U.S. Const. Art. 1, § 2, 3; art II § 1; art. VI.</p> <p>Various federal statutes, however, provide that a conviction may result in the loss of or ineligibility of holding any office in the United States. 18 USC § 2381. For example, treason.</p> | Not precluded if civil rights restored. |
| Welfare | <p>Temporary Assistance for Needy Families (TANF funds) under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, imposes a lifetime ban on TANF and Food Stamps for people with felony drug convictions after August 22, 1996, unless their state affirmatively passes legislation to opt out of the ban. The ban includes any state program funded under the Social Security Act (if a felony for use, distribution, or possession of a controlled substance). Children of the affected client may still receive assistance. A federal drug conviction or one from another state count.</p> | <p>While many states have opted out of the draconian provisions of the Personal Responsibility and Working Opportunity Act of 1996, Arizona has not. By not opting out, Federal restrictions apply.</p> |

Collateral Consequences Chart

| | Federal Law | Arizona Law |
|-------------------------|--|---|
| Housing | In 1996, Congress passed the "one strike," (Housing Opportunity Program Extension Act of 1996) authorizing local public housing authorities to obtain the criminal conviction and drug abuse treatment facilities records of adult applicants for screening or eviction of public housing applicants or residents. | Federal law governs |
| Divorce | State law governs | Arizona is one of fourteen pure "no fault" marital dissolution states. No special provisions pertain to dissolutions. But in some states, e.g. Ohio, a spouse imprisoned allows a divorce to be granted. |
| Military Service | No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. 10 USC § 504 | Federal law governs |
| Voting | No Prohibition U.S. Const. art. I, sec. 2, cl. 1, art. I, sec. 4; art. II, sec. 1, cl. 2; amend. XVII. Qualifications for voting in federal elections are determined by state law. | Cannot vote while incarcerated. A resident of another state incarcerated here may be able to vote by absentee ballot in their home state if allowed. In Arizona, a first time offender's right to vote is automatically restored upon absolute discharge from incarceration or completion of community supervision or probation. If two or more felonies, must apply to court that sentenced the offender. If the sentence resulted in prison, there is a two year waiting period before a person can apply. Same rule applies to first time federal offenders. If a person is convicted of more than one felony in another state, no provision for restoring your Arizona right to vote. |

Our clients face multiple barriers to a successful return to the community. The foregoing table is not meant to be exhaustive. Please contact Christopher Johns at johns@mail.maricopa.gov with corrections or for additions to future editions.

This table was created with the assistance of Rebecca Ruchalski, a law clerk for the Maricopa County Public Defender's Office.

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New Generation of Justice Hits ASU Law School

By David Kephart, Rule 38 Student Attorney

For months, students from Arizona State University College of Law who share a passion for justice and criminal defense work have been organizing into a new group known as the "Criminal Defense Mentor & Pro Bono Program," a program that many feel is long overdue. The program's goal is to promote mentoring between students and criminal defense attorneys. While most mentoring programs try to create only a personal relationship between the student and attorney, this new program creates a forum for education by encouraging "shadowing" of attorneys and assisting the attorneys through pro bono work. Some of the suggested activities include students attending court and assisting attorneys with various case duties such as legal and factual research to administrative case matters.

With a surge of interest from students, this new program has quickly grown to over 50 students strong, representing almost 10% of the students at ASU Law. Additionally, over 50 Maricopa County Public Defenders, Federal Public Defenders, and attorneys from the Arizona Association of Criminal Justice have volunteered to be mentors and educators.

Several of the students in the program have already taken the opportunity to shadow attorneys in the East Tempe Justice Court. As most students do not see the inside of a courtroom until late into their 2nd or 3rd years of law school, this opportunity proved both educational and insightful. Other students in the program recently took a tour of the Maricopa County Public Defender's Office and met with Public Defender Jim Haas and Special Assistant Jeremy Mussman. The tour ended with Dan Lowrance, Extern Supervisor, demonstrating Field Sobriety Tests. (To everyone's surprise, it turned out he was sober.)



The Criminal Defense Mentor & Pro Bono Program officially kicked off on January 30, 2004 with a mixer at Monti's La Casa Vieja in Tempe. Over 50 students and attorneys attended the event.

To learn more about the program or to volunteer, contact Dan Lowrance at lowrance@mail.maricopa.gov or the Program Coordinator Kelly Peralta-Vaughn at kelly.peralta-vaughn@asu.edu. Information regarding the program is also available on ASU School of Law's Pro Bono Organizations website which can be found at <http://www.law.asu.edu/?id=8275#Criminal>.



Law of the Land, Good Ideas Gone Bad

Plea Bargains and Resident Aliens

By Brian K. Bates

Editor's Note: Brian K. Bates is a shareholder in Quan, Burdette & Perez, P.C., in Houston, Texas. He is certified in immigration and nationality law by the Texas Board of Legal Specialization and has served on the Board's Immigration and Nationality Law Exam Commission. He is a past chair of the Texas chapter of the American Immigration Lawyers Association. This article, which first appeared in the Texas Bar Journal, Vol. 66, no. 10, p.878 (November 2003) is reprinted with permission of the author.

The Immigration and Nationality Act¹ (INA) contains many provisions that are catastrophic for noncitizens with criminal convictions. Even comparatively minor offenses require deportation and permanent exile from the United States. Regardless of how disproportionate that penalty may seem or how deserving the immigrant may be of a second chance, there is little if any discretion allowed an immigration judge. By the time the consequences become apparent to the immigrant, it is too late to do anything to prevent them. What seemed like a good plea or sentence in the criminal court becomes a cruel joke.

Aliens who are entitled to reside and work in the United States permanently are called "lawful permanent residents" (LPRs), "permanent residents," "immigrants," or "resident aliens." While an otherwise eligible LPR may eventually apply to become a U.S. citizen through the naturalization process, until that happens he or she remains an "alien," potentially subject to deportation or removal. This article focuses on LPRs and the potential for deportation, although any noncitizen may be affected by criminal conduct in several other significant ways.

Deportation (now called "removal") proceedings are very informal in comparison to a criminal trial. There is no jury. The immigration judge is empowered to make both findings of fact and conclusions of law. Strict rules of evidence do not apply, and hearsay is routinely admitted. Further, the Supreme Court has repeatedly held that deportation proceedings are civil in nature, and that most constitutional safeguards applicable to criminal defendants — such as protection against unlawfully seized evidence and ex post facto application of new legislation — do not apply.² Essentially, the only constitutional right that an alien possesses is the right to a "fundamentally fair" expulsion hearing. And what passes as "fundamentally fair" in immigration court would be unacceptable to most attorneys practicing in other areas of the law.

Criminal cases are not relitigated in immigration court. An immigration judge will not go behind a criminal conviction, nor question its underlying sufficiency.³ Submission by the government⁴ of a certified copy of the conviction generally constitutes the entire evidentiary portion of the hearing. Whatever is said in that certified copy is conclusively proven in removal proceedings. Deportability becomes a pure question of law: whether the judgment submitted qualifies as a "conviction," and whether the offense qualifies as one of the deportable categories (discussed below) contained in the INA.

A removal hearing, much like a criminal trial, has two parts. The first part is to determine the issue of deportability. The alien (called the "respondent") is called upon to plead to the charges on the charging document. If any of the charges are denied, a hearing is conducted to determine whether the

respondent is deportable. If the respondent is found deportable, the second phase of the hearing is to determine whether he or she must be deported or whether there is some form of relief from deportation available. This is comparable to the punishment phase of a criminal trial.

Where the INA provides no relief from removal (very often the case where deportability is based upon criminal conduct), both phases of removal proceedings may be completed in as little as five minutes. The government attorney submits an authenticated copy of the criminal judgment, that judgment renders the respondent deportable and ineligible for any relief, and an order of removal inevitably follows. Given such limited options in immigration court, proper planning and representation in criminal court is often the only means available to an LPR to avoid removal and permanent banishment.

Defining “Conviction”

Generally speaking, an alien whose removal is sought on account of criminal misconduct must have been “convicted.” In 1996, the INA was amended to incorporate a new expansive definition of “conviction.”⁵ This new definition requires either a formal judgment of guilt or, where an adjudication of guilt has been withheld, a finding of guilt by judge or jury or a plea of guilty or *nolo contendere* combined with an order by the court that some form of punishment, penalty, or restraint upon liberty be imposed.⁶

The new statute goes on to provide that any reference to “a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”⁷ A sentence of five years imprisonment is a sentence of five years, even if all or part of it is suspended for probation.

As a result of this new definition, a “deferred adjudication” under Texas law is now a “conviction” for immigration purposes. While the Fifth Circuit held otherwise in 1990,⁸ the Court subsequently ruled that the new statutory definition superseded its earlier holding such that a Texas deferred adjudication is now a “conviction” for immigration purposes.⁹ The Fifth Circuit even agreed that the new definition could be applied retroactively to deferred adjudications entered prior to 1996.

A deferred adjudication now will be considered a conviction for purposes of deportation or removal. However, as will be shown below, a deferred adjudication may still be preferable to other sentencing options in certain limited cases.

There are essentially five classes of criminal offenses that commonly constitute grounds of deportability, with much overlapping: (1) “crimes involving moral turpitude,”¹⁰ (2) offenses relating to controlled substances,¹¹ (3) offenses relating to firearms,¹² (4) offenses relating to domestic violence,¹³ and (5) “aggravated felonies” as defined in the INA.¹⁴ The INA reserves the harshest treatment for aliens convicted of “aggravated felonies.”

The aggravated felony definition found in the INA is frequently referenced in the Federal Sentencing Guidelines.¹⁵ For LPR aliens, aggravated felony convictions should be avoided if at all possible. Aggravated felons are deportable and statutorily ineligible for most forms of relief from removal.¹⁶ Most significantly, an LPR with an aggravated felony conviction is barred from “cancellation of removal,” the only form of relief that allows him or her to retain LPR status.¹⁷ No matter how long he or she has lived in this country, no matter the evidence of rehabilitation nor how compelling a case for leniency he or she may have, an alien with an aggravated felony conviction generally must be deported.¹⁸

Aggravated Felonies

The definition of “aggravated felony” has since been amended at least six times and now is divided into subsections (A) through (U).¹⁹ Many of the subsections are extremely broad, such that the definition now incorporates by reference literally hundreds of federal and state offenses. Many of the offenses now deemed aggravated felonies are not felonies and hardly seem “aggravated.” Any burglary or theft offense for which a sentence of one year or more is imposed, for example, is an aggravated felony.²⁰ Any “crime of violence” as defined in the U.S. Code²¹ for which a sentence of a year or more is imposed is an aggravated felony.²²

The concept of “aggravated felony” is broadened by the fact that the full sentence of imprisonment is considered even if imposition or execution of the sentence is suspended in lieu of probation.²³ An individual with a Class A misdemeanor theft conviction and a sentence of one year probated is now an aggravated felon under the INA, even if he or she never spends a day in jail.

As noted above, many of the deportable categories overlap, and controlled substance offenses constitute a major example of this overlap. Almost any controlled substance offense renders an alien deportable under the specific provision for “offenses relating to a controlled substance.” In most cases, a controlled substance offense other than a misdemeanor for simple possession will also be classified as a “drug trafficking crime” and therefore an “aggravated felony” under the INA.²⁴ In the Fifth Circuit, even simple possession of a controlled substance becomes a “drug trafficking crime” if it is a felony under state law.²⁵

Deferred Adjudications As “Aggravated Felonies”

Many of the offenses now included within INA 1 101(a)(43) are aggravated felonies only if a “term of imprisonment” of at least one year is imposed. This requirement applies, for example, to theft and burglary offenses, “crimes of violence,” and certain passport offenses, as well as bribery, counterfeiting, and forgery.²⁶ In such cases, a deferred adjudication makes a big difference because there is no sentence of imprisonment.

While the Texas Code of Criminal Procedure allows probation with a deferred adjudication, this is NOT a pronouncement of sentence. The “pronouncement of sentence” comes — if it ever comes — only after an adjudication of guilt.²⁷ Further, there is no mention of a “term of imprisonment” anywhere in the deferred adjudication statute.

Thus, while a deferred adjudication is now a “conviction” for immigration purposes, it cannot be a conviction for an “aggravated felony” where the aggravated felony definition requires a sentence of imprisonment. In such cases, a deferred adjudication may still be a critically important sentencing option for the noncitizen defendant.

What Can the Criminal Defense Attorney Do?

First, every attorney who represents noncitizens in criminal proceedings should study the definition of “aggravated felony” found at 1 101(a)(43) of the INA.²⁸ Second, an experienced immigration attorney should be consulted before accepting any plea agreement involving a noncitizen. Since deportation is usually the most significant consequence of the conviction, it requires more, and not less, consideration than potential jail time or the amount of a fine.

The criminal defense attorney should strive to avoid a conviction for any deportable offense, but especially those classified as aggravated felonies. This may require action that goes against the professional instincts of defense attorneys.

It may well be in the client's ultimate best interest, for example, to accept a higher fine or more time in jail rather than a longer probationary period. An LPR who pleads guilty to a theft offense and receives two years probation is now virtually certain to be deported because a sentence of a year or more makes "theft" an aggravated felony regardless of whether any portion of the sentence is suspended for probation. A noncitizen with a theft conviction — or a "crime of violence" or any other conviction that becomes an aggravated felony with a sentence of a year or more — would be much better off serving 364 days in jail. Another possibility, equally counterintuitive, would be a deferred adjudication even with a longer period of probation. The criminal defense and immigration bars have much to learn from each other, and more dialogue between them will better serve their clients. By working together, the client will be well served in both criminal and immigration courts.

- n9 *Moosa v. INS*, 171 F.3d 994 (Fifth Cir. 1999).
- n10 INA 11 237(a)(2)(A)(i), (ii); 8 U.S.C. 11 1227(a)(2)(A)(i), (ii).
- n11 INA 1 237(a)(2)(B); 8 U.S.C. 1 1227(a)(2)(B).
- n12 INA 1 237(a)(2)(C); 8 U.S.C. 1 1227(a)(2)(C).
- n13 INA 1 237(a)(2)(E); 8 U.S.C. 1 1227(a)(2)(E).
- n14 INA 1 237(a)(2)(A)(iii); 8 U.S.C. 1 1227(a)(2)(A)(iii).
- n15 See, e.g., FSG 1 2L1.2, Commentary.
- n16 See, e.g., INA 11 237(a)(2)(A)(iii), 238(c), 208(b)(2)(B), 240A(a)(3); 8 U.S.C. 11 1227(a)(2)(A)(iii), 1228(c), 1158(b)(2)(B), 1229a(a)(3).
- n17 INA 1 240A(a), 8 U.S.C. 1 1229b(a).
- n18 The only exception generally applicable is that an aggravated felon who can prove a probability of torture or other significant persecution in his or her home country can generally apply for withholding or deferral of removal to that country under the United Nations Convention Against Torture.
- n19 INA 1 101(a)(43); 8 U.S.C. 1 1101(a)(43).
- n20 INA 1 101(a)(43)(G), 8 U.S.C. 1 1101(a)(43)(G).
- n21 18 U.S.C. 1 16.
- n22 INS 1 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F).
- n23 INA 1 101(a)(48)(B); 8 U.S.C. 1 1101(a)(48)(B).
- n24 INA 11 101(a)(43)(B), 237(a)(2)(A)(iii), 8 U.S.C. 11 1101(a)(43)(B), 1227(a)(2)(A)(iii).
- n25 *United States v. Hernandez-Avalos*, 251 F.3d 505 (Fifth Cir. 2001).
- n26 INA 11 101(a)(43)(F), (G), (P) and (R); 8 U.S.C. 11 1101(a)(43)(F), (G), (P) and (R).
- n27 Tex. Code of Crim. P. Art. 42.12, 1 5(b).
- n28 8 U.S.C. 11 1101(a)(43), (48).



Endnotes

- n1 8 U.S.C. 1 1101, et. seq.
- n2 See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Galvan v. Press*, 347 U.S. 522 (1954).
- n3 *Matter of Roberts*, 20 I. & N. Dec. 294 (BIA 1991).
- n4 Formerly, the Immigration and Naturalization Service prosecuted removal cases. Effective March 1, 2003, the "Agency Formerly Known as INS" has become three separate agencies within the Department of Homeland Security. The government attorneys prosecuting removal cases are now housed within the new Bureau of Immigration and Customs Enforcement.
- n5 INA 1 101(a)(48); 8 U.S.C. 1 1101(a)(48).
- n6 INA 1 101(a)(48)(A), 8 U.S.C. 1 1101(a)(48)(A).
- n7 INA 1 101(a)(48)(B), 8 U.S.C. 1 1101(a)(48)(B).
- n8 *Martinez-Montoya v. INS*, 904 F.2d 1018 (Fifth Cir. 1990).

Practice Pointer

Motion to Strike State's Allegation Pursuant to A.R.S. §13-702.02 and *Thompson*

Editors' Note: For the past several years, the Maricopa County Attorney's Office has been filing a form motion seeking to use ARS § 13-702.02 (the sentencing statute dealing with multiple offenses not committed on the same occasion) to allege priors that are too old to be alleged as historical priors under § 13-604(V)(1)(b,c). Several courts have rejected these motions, recognizing that ARS § 13-702.02 was not intended to be used as a means to circumvent the time limitations imposed on using prior felony convictions. Unfortunately, other courts have failed to recognize this (e.g., one court allowed the state to use a 1995 possession of drug paraphernalia class 6 felony conviction to require mandatory prison on a 2003 class 4 forgery offense. Jason Keller, the defender attorney in that case, filed a special action on the issue, but, Division One of the Court of Appeals declined to accept jurisdiction. Undaunted, Jason took the case to trial and got a not guilty verdict.).

Since the issue remains unresolved at the trial court level, it is essential for us to continue to litigate it vigorously. The following proposed motion, prepared by Donna Elm in 2002, is an excellent means for doing so. It is available on the PD shared drive under PDFForms/Motions. Attorneys should consider this type of motion in any case where the state is alleging § 13-702.02 on previously convicted and sentenced cases. Of course, this type of motion is not appropriate when the State is alleging § 13-702.02 properly (i.e., for multiple offenses that are going to trial at the same time).

SAMPLE MOTION

The Maricopa County Attorney's Office has filed its "form" motion alleging that the Defendant has prior convictions that would require the sentencing scheme of A.R.S. § 13.702.02 to apply, pursuant to the County Attorney's interpretation of State v. Thompson, 200 Ariz. 439, 27 P.3d 796 (2001). The Defendant moves to strike this allegation as contrary to the statutes and law, and because the County Attorney's interpretation of Thompson is misguided. This request is based upon A.R.S. §§ 13.604, 13-702.02, the language of the Thompson decision, the Due Process clauses of the Arizona and U.S. Constitutions, and rules of statutory construction.

The State contends that prior convictions that are too old to be used as "historical priors" pursuant to A.R.S. § 13-604(V)(1) can instead enhance sentencing pursuant to A.R.S. § 13.702.02 to require mandatory prison sentencing. The State specifically alleges that, "if the Defendant is convicted in [the instant case], the Defendant must be sentenced pursuant to A.R.S. § 13.702.02 and State v. Thompson." The State offers no argument as to how either § 13-702.02 or Thompson could be applied when the "priors" in issue here are really old convictions that, due to their age, fall outside the ambit of even "historical priors." The State misinterprets Thompson.

Prior to the enactment of A.R.S. § 13-702.02, Arizona sentenced non-adjudicated other offenses that had been consolidated for trial in accordance with State v. Hannah, 126 Ariz. 575, 617 P.2d 527 (1980). These so-called "Hannah priors" were codified in A.R.S. § 13-604(H). When the legislature amended the priors sentencing statute in 1993, that section was eliminated. The sole vestige that remained in that statute was A.R.S. § 13-604(M), addressing "spree" offenses. Thompson, 200 Ariz. at 441, 27 P.3d at 798. At the same time that the legislature repealed the Hannah priors statute, it enacted A.R.S. § 13-702.02, allowing for mandatory prison sentencing:

(A) A person who is convicted of two or more felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions as defined in § 13-604 shall be sentenced, for the second or subsequent offense, pursuant to this section.

In Thompson, the factual scenario was materially different from the facts here. Thompson had plead guilty to two drug offenses. He was then charged with and found guilty of a theft offense that occurred *before* the drug offenses occurred; the sole issue presented to the Court was whether § 13-604(C) (prior convictions) or § 13-702.02 (offenses not on the same occasion but consolidated) should be used in sentencing him. Id. at 440, 27 P.3d 797. The Court reasoned that because the drug offenses were not consolidated for trial and were within the five-year window prescribed in the definition of “historical priors” (see A.R.S. § 13-604(V)(1)(c)), they would enhance the theft conviction as “historical priors” rather than under § 13-702.02. Id. at 441, 27 P.2d at 798. What Thompson addressed, then, was the situation when the other offenses being considered for sentencing enhancement had not yet been sentenced; it was not dealing with other offenses had had been previously adjudicated in the distant past.

This distinction was recognized by the particular terminology used in Thompson, differentiating between “offenses” and “convictions,” the latter being offenses where a finding, verdict, or determination of guilt was made. Id. (citing State v. Walden, 183 Ariz. 595, 615, 905 P.2d 974, 994 (1995)). The Court contrasted “conviction” and “offense” in its parting discussion in Thompson: “If the legislature wants the prior conviction to precede *not only the present conviction but also the present offense*, it may re-write the statute” Id. (emphasis added). It also contrasted the two in replying to Thompson’s argument that to be a “historical prior,” the *conviction* must precede the present *offense*. “But the statute provides only that the prior *offense* must precede the present *offense*.” Id. (emphasis added). Furthermore, the Court limited § 13-702.02 to cases where unsentenced other offenses were being used to enhance the new offense’s sentence: “any prior *offense* that predates the present offense by more than the period prescribed by A.R.S. § 13-604(V)(1)(b) or (c) is covered by A.R.S. § 13-702.02.” Id. (emphasis added). Realizing that the Court distinguished between sentenced and non-adjudicated offenses, § 13-702.02 pertains to offenses that had not yet resulted in a “conviction.”

It is thus clear that the Court in Thompson did not intend to give the prosecution a means to circumvent the time limitations of A.R.S. § 13-604(V) by allowing a very old prior to be used to enhance a sentence. Otherwise, the time limitations scheme of § 13-604(V) are meaningless because the State could mandate prison when priors exceed its five- and ten-year boundaries by turning to § 13-702.02. Patently, to allow the State now to secure mandatory prison exposure by alleging expired historical priors under § 13-702.02 subverts the intent and structure of the sentencing scheme envisioned by the legislature.

While a ruling from a fellow Superior Court judge bears no precedential effect, Judge Heilman’s analysis of the issue was well taken. In identical litigation in State v. Marlo Gonzales, CR 2001-013484, Judge Heilman distinguished between the titles of the two statutes. He found that § 13-702.02’s title of “multiple *offenses* not committed on the same occasion; sentencing,” stood in contraposition to § 13-604(V)’s language of “Historical prior felony *conviction means ... any prior felony conviction*.” Therefore, he dismissed the State’s allegation of § 13-702.02. See Minute Entry, attached as an Exhibit.

Therefore, this Court should similarly enter an order, striking the allegation of enhancement under A.R.S. § 13-702.02.



Jury and Bench Trial Results

December 2003

Public Defender's Office

| Dates: Start - Finish | Attorney Investigator <i>Paralegal</i> | Judge | Prosecutor | CR# and Charges(s) | Result | Bench or Jury Trial |
|--------------------------|--|----------|------------|--|---|------------------------|
| 11/5-11/5 | Akins | Hamblin | Voyles | CR03-121681-001 Reckless Driving | Not Guilty | Bench |
| 11/19-11/25 | Bublik/Colon Munoz/Gotsch | Gaylord | Basta | CR02-19645 Att. Armed Robbery, F3D Agg. Assault, F3D | Not Guilty of Att. Armed Robbery; Guilty Agg. Assault | Jury |
| 11/24-12/01 | Rothschild Bradley Lenz | Trujillo | Keleman | CR03-014207-001DT Agg. Assault w/deadly firearm, F3 | Not Guilty | Jury |
| 12/2-12/3 | Kalafat | O'Connor | Reddy | CR03-09858-001DT Misconduct Inv. Weapons, F4 | Guilty | Jury |
| 12/2-12/3 | Gaziano | Gaylord | Rodriguez | CR03-033262-001SE POM, F6N PODP, F6N | Guilty | Jury |
| 12/5-12/8 | Hinshaw | Ore | Starkovick | TR02-04953MI, DUI | Guilty | Jury |
| 12/9-12/16 | Willmott / Conlon Jones Curtis | Araneta | Lynch | CR03-011657-001DT Manslaughter, F3D | Not Guilty | Jury |
| 12/10-12/10 | Walker | Dairman | Montgomery | CR03-036139-001SE 2 cts. Agg DUI, F4N, Criminal Damage, F4N 2 cts. Agg DUI, passenger under 15, F6N | Guilty | Bench |
| 12/15-12/17 | Borrelli / Davis Curtis | Martin | Church | CR03-017028-001DT Misconduct Involving Weapons, F4 | Guilty | Jury |
| 12/17-12/18 | Farney Jones Armstrong | Houser | Thrasher | CR03-010092-001DT Burglary 3rd Degree, F4 Theft, F4 | Guilty | Jury |

Jury and Bench Trial Results

December 2003

Legal Advocate's Office

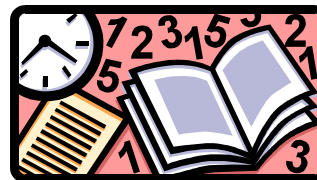
| Dates: Start - Finish | Attorney Investigator <i>Paralegal</i> | Judge | CR# and Charges(s) | Result | Bench or Jury Trial |
|--------------------------|--|--------------|--|--------------------------------|------------------------|
| 12/01-12/03 | K. Everett | Donahoe | CR2003-014552 Agg. Assault-Dang. | Lesser Included Dis.Conduct | Jury |
| 12/03-12/09 | J. Logan Cano | Rayes | CR 2003-016576 3 cts Armed Robbery | Not Guilty | Jury |
| 12/04-12/09 | M. Schaffer | Buttrick | CR2002-017413, 3 cts. Sex.Conduct, F-2DCAC Sex.Abuse, F-3DCAC Child Prostitution, F-2DCAC | Guilty | Jury |
| 12/08-12/10 | F. Gray Cano Mullavey | P. Reinstein | CR2003-017666 Agg. Assault, 3F Dang. & MIW, 4F | Guilty (Trial in Absentia) | Jury |
| 12/10-12/16 | S. Koestner | Gaylord | CR2003-012506 6 cts. Agg. Assault, all F3D | Not Guilty | Jury |
| 12/14-12/23 | K. Everett Mullavey | R.Reinstein | CR2001-017277 1st Degree Homicide Fel. Murder 2 cts. Armed Robbery Agg. Assault Mis. Involv. Weapons | Guilty | Bench |

Legal Defender's Office

| Dates: Start - Finish | Attorney Investigator <i>Paralegal</i> | Judge | Prosecutor | CR# and Charges(s) | Result | Bench or Jury Trial |
|--------------------------|--|-----------|-------------|--|--------|------------------------|
| 12/01-12/03 | M. Branscomb | McClennen | T. Clarke | CR 2003-019071-001 DT Burglary 3d Degree Poss. Burg. Tools | Guilty | Jury |
| 12/15-12/18 | S. Allen D. Reger | Talamante | J. Trudgian | CR2003-033404-001 SE Theft of Property, C6F | Guilty | Jury |

Arizona Advance Reports

By Stephen Collins, Defender Attorney



State v. Dann, 412 Ariz. Adv. Rep. 3 (SC, 10/29/03)

State v. Montano, 412 Ariz. Adv. Rep. 11 (SC, 10/21/03)

Death penalty cases remanded for sentencing by a jury pursuant to *State v. Ring (Ring III)*. The Arizona Supreme Court concluded that it could not say beyond a reasonable doubt that a jury would have weighed the aggravating factors and the mitigating factors the same as the trial judge did.

State v. Maldonado, 412 Ariz. Adv. Rep. 6 (CA 1, 11/16/03)

Maldonado faced over thirty years imprisonment for the offenses with which she was charged. Therefore, she was entitled to a twelve-person jury under Arizona law. The prosecutor and defense counsel stipulated to an eight-person jury in exchange for a dismissal of one of the counts. This was held to be an inadequate waiver of the twelve-person jury because the trial judge failed to advise Maldonado of the right she was waiving. The fact Maldonado was sentenced to less than thirty years imprisonment did not cure the error. The critical factor is the amount of prison a defendant faces at the commencement of trial, not the sentence.

State v. Sepahi, 412 Ariz. Adv. Rep. 8 (SC, 10/31/03)

Sepahi was convicted of assault for shooting a fourteen-year-old girl. The Arizona Court of Appeals held this was not a dangerous crime against children because there was no finding that Sepahi was "peculiarly dangerous to children." The Arizona Supreme Court reversed, holding that such a finding is not required under A.R.S. Section 13-604.01. An offense is a dangerous crime against children if it is one of the enumerated offenses in 13-604.01 and the defendant's conduct "must be focused on, directed against, aimed at, or target a victim under the age of fifteen."

In re the commitment of Taylor, 412 Ariz. Adv. Rep. 27 (CA 2, 11/10/03)

The state sought to commit Taylor pursuant to Arizona's Sexually Violent Persons Act (SVP). Taylor argued he could not be committed pursuant to the SVP Act because there had been no finding in his criminal case that his conviction for attempted kidnapping involved "sexual motivation," as required by the Act. The Arizona Court of Appeals held that the determination of sexual motivation could be made by the court at the time of sentencing or by the trier of fact during subsequent civil commitment proceedings pursuant to the SVP Act.



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